No. 2393

IN

The United States Circuit Court of Appeals

for the Ninth Circuit

THE STEAMER "SAMSON" and BARGE No. 8, BARGE No. 9, and BARGE No. 27

COLUMBIA CONTRACT COMPANY
CLAIMANT AND APPELLANT

VS.

SHAVER TRANSPORTATION COMPANY
LIBELANT AND APPELLEE

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation
RESPONDENT IN PERSONAM

Petition for Rehearing of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

TEAL, MINOR & WINFREE,
ROGERS MAC VEAGH,
Proctors for Claimant and Appellant

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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THE STEAMER "SAMSON" AND BARGE No. 8, BARGE No. 9, AND BARGE No. 27,

COLUMBIA CONTRACT COMPANY,
Claimant and Appellant,

vs.

SHAVER TRANSPORTATION COMPANY,
Libelant and Appellee,

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation,
Respondent in Personam.

Petition for Rehearing of Appellant

Appeal from the District Court of the United States for the District of Oregon.

SUMMARY

Comes now COLUMBIA CONTRACT COMPANY, the above-named Claimant and Appellant, and makes application for a modification of the order and judgment heretofore in this case rendered by this honorable Court in the following particulars, to wit:

That said order and judgment herein, made and filed on the 13th day of October, 1914, affirming the decree of the Court below, be so modified as to direct that the said decree of the Court below be reversed as to BARGE No. 8, BARGE No. 9, and BARGE No. 27, and that the cause be remanded for further proceedings not inconsistent with such modification.

This petition is based upon the following grounds:

I.

Ruling Below was Made on Exceptions to Libel — Brief of Claimant and Appellant herein.

The reasons for which the Court below held the barges responsible with the "Samson" are very briefly stated in the opinion of that Court (Apostles, p. 62) as follows:

> "It has already been held herein that the three stone barges would be responsible with the 'SAMSON' for any damage from the latter's fault. (The John Cooker, Fed. Case No. 7337.) In view of the fact that the 'SAMSON' and the stone barges were both owned and claimed by

the present claimant, taken in connection with other circumstances of the case, the court must adhere to the former ruling."

The "former ruling" referred to by the Court was made on exceptions raised by Claimant below (Claimant and Appellant herein) to the libel with regard to the liability of the barges. At that time no evidence was before the Court, and it may well be conceded that in overruling the exceptions the Court was simply following out the general admiralty principle of refusing to exclude before final determination anything that might affect the issue as a whole. But we submit that such a decision, rendered before trial, should not, and in the case at bar must not, control the final judgment. No reasons are given in the final judgment by the Court below for such decision, other than those stated in the paragraph quoted above (Apostles, p. 62). These, we submit, were fully met and answered in the brief for Claimant and Appellant herein (pp. 125-129, VII); but lack of time upon the argument before this Court made it impossible for proctor for Claimant and Appellant herein to argue this particular point *viva voce*. We have no desire or intention of multiplying argument and citation in this already voluminous proceeding; but we feel convinced that a general affirmance of the decree below, such as is effected by the judgment of this Court as it now stands herein, will result, not only in grave injustice, but also in the estab-

lishment in this Circuit of a precedent utterly at variance with the established law of admiralty and the fundamental rules of justice and good sense. We therefore feel justified in presenting the matter, very concisely, to this Court, and in urging it most earnestly to modify in the manner indicated its judgment and order herein.

II.

The Barges were Entirely Dependent on the "SAMSON."

Reference has hereinabove been made to the brief heretofore filed in this Court on behalf of Claimant and Appellant herein, pp. 125-129, VII. We do not believe that any useful purpose will be served by again going over the ground covered in those pages, and we therefore, for brevity's sake, refer this Court, in support of this petition, to that portion of our said brief. Particularly do we ask for a careful examination of the quotation from Spencer (Marine Collisions, 1895 ed., section 122, p. 261) and of the five cases cited.

It must be continually borne in mind—and this is the crux of the whole question—that **the "SAMSON'S" barges at no time had any motive power or steering-control of their own.** They were helpless, uncontrolled hulks, lashed to the "SAMSON" so as to form, with her, one vessel, **and that vessel the "SAMSON."** By this, of course, it is not meant that the barges were actually a part of the "SAMSON," her tackle, apparel, or

furniture. But, so far as their navigation and control was concerned, they were utterly dependent upon the "SAMSON" for their every move. It is familiar law that a tow may be separately liable for a collision; but, as pointed out on page 128 of our brief cited *supra*, such cases are those where the tows are "hawser-tows" —fastened **behind** the tugs by a line or lines— and therefore needing to be and actually steered independently of their tugs. It is not believed that a single case can be found in the books where a tow, lashed to a tug and absolutely under its control, both as to speed and as to steering, has been held liable for a collision caused by the act or negligence of the tug.

III.

"The Tug John Cooker and the Barge James W. Eaton."

The case upon which, apparently, the Court below based its decision holding the barges liable —the fact that Claimant and Appellant herein owned both the "SAMSON" and the barges being specifically noted (see excerpt from opinion, quoted *supra*)—is

The Tug John Cooker and the Barge James W. Eaton,

10 Benedict, 488; 13 Fed. Cas., 665 (Fed. Case No. 7337),

Dist. Ct., E. D. N. Y., 1879.

In that case the tow was a "hawser-tow," and Judge BENEDICT **held** that the collision was due to the fault of the tow, and that, as a single stipulation for value had been given by the claimant to cover both tug and tow, it was unnecessary to determine **as between the tug and the tow which was responsible for the collision.** In other words, either might by its own independent acts have caused the collision; but **can it be for one moment contended that the "SAMSON'S" barges rammed or could have rammed the "HENDERSON" independently of the "SAMSON"? The barges were completely dependent on the "SAMSON" for their every move.** Such being the case, the fact that, for the sake of convenience, one stipulation was filed by Claimant below to cover both the "SAMSON" and the barges cannot under any conceivable theory of law or practice operate to make liable as independent entities what were in fact utterly dependent ones.

We have laid great stress on these considerations, and we have done so advisedly. The unqualified affirmance of the judgment below will result in a total subversion of one of the most ancient and fundamental axioms of admiralty. No vessel that is not in command of her own movements, but is a mere instrument in the hands of another vessel or of the elements (always provided, of course, she has not been nor is negligent in becoming subject to such ex-

ternal control), can be held liable for damage done through her as such instrument by a force foreign and external to her. This is the law, rooted alike in authority and in reason; and Libelant and Appellee herein should not be heard urging this Court to disregard it and to assert, by simply affirming without modification the decree below, a new and most unsound doctrine—one which will give rise to the gravest doubts and most troublesome questions throughout the domain of maritime law and practice.

IV.

The Rule of "Sturgis v. Boyer."

Fortunately this very question has been definitely passed upon by the Supreme Court of the United States; and it is perhaps owing to this fact that proctors for Libelant and Appellee herein have not, in their brief filed with this Court, touched this point at all. In

Slurgis v. Boyer,
65 U. S. (24 How.), 110; 16 L. C. P. Co. ed., 591,
U. S. Supr. Ct., 1860,

the jib-boom of a ship lashed to a tug upset a loaded lighter. The ship was under the exclusive control of the tug; and in holding the tug solely in fault **and solely liable in damages** Mr. Justice CLIFFORD, speaking for the Court, said (at pp. 594-596 of 16 L. C. P. Co. ed.):

"Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence or mismanagement of the master and crew of the other vessel for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. **But whenever the tug, under the charge of her own master and crew, and in the usual**

Emphasized type ours.

and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master or crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. * * * * * * *

A vessel properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it, and yet she certainly would not be liable for damages which it was not in her power to prevent. So, also, ships at sea, from storms or darkness of the weather, may come in collision with one another without fault on either side, and in that case must each bear its own loss, although one is much more damaged than the other. *Stainback v. Rae,* 14 How., 532. Applying these principles to the present case, it is obvious what the result must be. Without repeating the testimony, it will be sufficient to say, that

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Emphasized type ours.

it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction and management of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that anyone belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises."

This language is too clear to need comment or exegesis; and we submit it as conclusive in favor of Claimant and Appellant herein on the question raised by this petition.

V.

Limitation of Liability Impossible to Determine under the Decision, unless Modified.

The importance, indeed the necessity, of some specific determination by this Court of the liability (if any) attaching to the barges becomes evident in considering the application of this judgment, as it now stands, to proceedings for limitation of liability under Section 4283 of the Revised Statutes of the United States. The principle underlying such limitation is too well known and too firmly established to need comment or support. Suppose, now, that Claimant and Appellant herein should desire to invoke the

statute and limit its liability: what would be its position? There is no question but that such limitation could be taken advantage of. In the leading case of

New York & Wilmington S. S. Co., "The Benefactor,"
103 U. S. (13 Otto), 239 and 247; 26 L. C. P. Co. ed., 351 and 466,
U. S. Supr. Ct., 1887,

Mr. Justice BRADLEY said (at pp. 353-354 of 26 L. C. P. Co. ed.):

> "Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. **Perhaps they can never be precluded so long as any damage or loss remains unpaid.**"

This doctrine was later reaffirmed by the same Justice, in the case of

Place v. Norwich & N. Y. Transportation Co., "The City of Norwich,"
118 U. S. 468 and 526; 30 L. C. P. Co. ed., 134,
U. S. Supr. Ct., 1886,

where (at p. 142 of 30 L. C. P. Co. ed.) he said, speaking of the trial below in the case then at bar:

"The trial on the merits resulted in determining which vessel was in fault, and in liquidating the amount of damage sustained by the libelants, to be used as a basis of their *pro rata* share in the fund which might ultimately be decreed, subject to their claim and the claims of other parties. It did not settle the amount of that fund, nor the extent of the liability of the owners of the steamer. In the case of *The Benefactor,* 103 U. S. 239 (Bk. 25,* L. ed. 351), this matter was fully considered, and we held that 'The amount recovered, whether before the limitation proceedings are commenced or afterwards, and whether in the court of first instance or an appellate court, will stand as the recoveror's basis for *pro rata* division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in the ordinary course.' "

Of this rule as laid down by the Supreme Court of the United States Mr. Spencer says:

"Neither the law nor the rules of practice prevent a party from invoking the benefit of the act at any time prior to actual payment of the owner's liability and satisfaction of the injured party's demand. The rule stated in 'The Benefactor' affords the owner the most liberal opportunity to enjoy the provisions of

*So in text.

the statute, and **nothing short of actual payment has yet been held sufficient to preclude an owner from claiming the benefits of the act.**"

(Spencer on Marine Collisions,
1895 ed., §216, pp. 392-393.)

And again:

"The weight of authority is to the effect that the owner may abandon the vessel at any time, so long as he has not expressly renounced his right to do so, or has not pursued a line of conduct incompatible with the exercise of the right."

(Idem., §216, p. 396.)

See also 36 Cyc., 424.

Thus, Claimant and Appellant herein has the right to invoke the statute and limit its liability for the collision with the "HENDERSON"—but to what shall such liability be limited? To the value of the "SAMSON"? To the value of BARGE No. 8? BARGE No. 9? BARGE No. 27? Or of a combination of them? Or of them all? Obviously a mere affirmance of the judgment below, which held the "SAMSON" liable for the collision **and the barges liable with her,** will not dispose of these questions. **If the barges are considered as responsible for the collision, it can only be on the theory that the barges did the damage.** It is important to note that the decisions of both this honorable Court and the Court below are

silent as to which and how many barges did the damage. One barge—the starboard one—admittedly never touched the "HENDERSON." If the barges are held to have occasioned the loss, plainly their Claimant's liability is limited to their value alone. Consequently it is necessary to determine which barges, if any, did the damage. If, on the other hand, the "SAMSON" is held liable, it is clear that under the law as indicated in the foregoing portions of this petition the "SAMSON'S" value alone is the measure of the limitation; **yet the decision below, as affirmed without modification, holds the barges "responsible with the 'SAMSON' for the latter's fault."** The result is that the limit of liability on a collision for which the barges are "responsible" jointly with the "SAMSON" would be simply the value of the "SAMSON"; while if the barges are considered to have caused the loss (the only ground on which they can be held responsible), the limit of liability for such loss would be simply their value, although the "SAMSON" has been held in fault for the collision! This logical *impasse* has been caused by a confusion in the treatment of the "SAMSON'S" tow. This is not a case where the tow was free to choose between different courses of action, even within narrow limits, as in *"The John Cooker"* above referred to. Here the barges, as has been said *supra,* though separate entities for the purpose of limiting liability, were mere instruments of the

"Samson" in doing the damage. Liability for such damage, therefore, must attach either to the "Samson" or to them—it cannot attach to both. **A passive instrument in the hands of an active agent cannot be considered as in any way contributing to or jointly liable for the agent's own act.**

The logical solution is to make it clear that the barges are not liable for the collision. Under this view the difficulties now created by the judgment herein will disappear, and the limit of liability be fixed at the value of the "Samson"—the only vessel that can properly be held liable.

VI.

Conclusion.

We do not ask for a rehearing on the question of the liability of the "Samson" nor upon the law as applied by this Court to the evidence with regard to the other features of the case at bar. We ask only that the judgment and order herein be so modified as to make it clear that no liability attaches thereunder to Barge No. 8, Barge No. 9, and Barge No. 27, and that the cause be remanded for further proceedings not inconsistent with such modification.

Respectfully submitted,

TEAL, MINOR & WINFREE,
ROGERS MAC VEAGH,
Proctors for Claimant and Appellant.

STATE OF OREGON,
District of Oregon,
County of Multnomah, } ss.

I, WIRT MINOR, of proctors for Claimant and Appellant in the above entitled cause, hereby certify that in my judgment the foregoing petition is well grounded, and that the same is not interposed for delay.

Portland, Oregon, November 5, 1914.

WIRT MINOR,
Of Proctors for Claimant and Appellant.